# 2018 CobraAid Toolkit

*Employer COBRA Procedures*
*Company Name*

| | |
|---|---|
| **Name:** | **Phone** |
| **Address:** | **Office Hours** |

## Initial Notice of COBRA Rights

**The Plan Administrator has sent an Initial Notice of COBRA Rights to all employees (and spouses and dependents, where applicable) currently covered under the company's group health plan as of:**

- Initial/General Notice has been sent 1st class mail with proof of mailing to the covered employee (and spouse and dependents, where applicable) to the last known address.
- Other method (included in new hire packet, etc.)

## Newly Covered Employees:

The plan administrator provides an Initial/General Notice of COBRA rights to newly covered employees (and spouses and dependents where applicable) to the last known address via:

- **First class mail with proof of mailing.**
- **Other method (included in new hire packet, etc.)**

## Qualifying Event Notice:

The Plan Administrator will send a Qualifying Event Notice to a Qualified Beneficiary who has a Qualifying Event as listed below.

**Qualifying Events:**

1. Termination of employment (for reasons other than gross misconduct)
2. Reduction of hours worked by the covered employee.
3. Death of the covered employee.
4. Divorce or legal separation.
5. Dependent child no longer meets the plan's eligibility requirements.
6. Dependent loses coverage due to the employee becoming entitled to Medicare.
7. Company files for Bankruptcy under Chapter 11 of the U.S Bankruptcy Code.

Qualifying Events notices will be sent via:
□First class mail with proof of mailing to the last known address of the Qualified Beneficiary (and spouse and dependents where applicable).

□Other Method

**The CobraAid COBRA Administration Manual was developed with the intent of assisting the employer and Plan Administrator in managing the day- to-day tasks of COBRA administration. CobraAid is not engaged in the rendering of legal advice. If legal advice is needed, the employer should contact competent legal counsel.**

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## Employer COBRA Procedures

### Background

Congress passed The Consolidated Omnibus Budget Reconciliation Act (COBRA) in 1986. One of the provisions of COBRA is to provide certain individuals with the right to temporarily continue their health coverage at group rates. The law generally applies to employers who sponsor a group health plan and have 20 or more full or part time employees during 50 percent or more of the business days in the preceding calendar year. A “group health plan” is defined as a plan that provides medical benefits for the employer’s own employees and dependents through insurance, HMO, or self funded arrangement. Medical benefits may include:

1. Hospital Care
2. Physician Care
3. Prescription Drugs
4. Other types of medical care, such as dental and vision.

Life insurance is not covered under COBRA.

### 2004 COBRA Regulations

On May 26, 2004, the Department of Labor issued final rules addressing certain notice requirements under COBRA. Group health plans must establish new procedures, update COBRA notices and Summary Plan Descriptions (SPD's), and provide new notices required by the final regulations.

The final rules become effective on the first day of the first plan year beginning on or after November 26, 2004. The new regulations will not apply until January 1, 2005 for group health plans using a calendar year for the plan year.

## Qualified Beneficiaries

Continuation coverage must only be offered to Qualified Beneficiaries. That is, individuals who were covered by the group health plan by virtue of his or her performance of services for the employer maintaining the group health plan on the day before a Qualifying Event.

A Qualified Beneficiary may be a former employee, spouse, former spouse, dependent children, retiree, or a child born to or placed for adoption with a covered employee.

Employees who are non-resident aliens are not considered Qualified Beneficiaries.

Domestic partners (of unmarried employees) are not entitled to COBRA rights.

And although retirees may be considered Qualified Beneficiaries, they are not included in the employee count when determining whether the employer meets the 20-employee threshold that will make the employer subject to COBRA unless they were active employees during the year being measured to determine COBRA status for the current year. Non-resident aliens, however, are counted when applying the 20-employee test.

**Qualifying Events**
Qualifying Events are events that would cause a covered employee to lose group health coverage.

QUALIFYING EVENTS FOR EMPLOYEES INCLUDE:

1. Termination of employment for reasons other than "gross misconduct".
2. Reduction of hours worked by the employee.

QUALIFYING EVENTS FOR SPOUSES AND DEPENDENTS INCLUDE:

1. Death of the employee.
2. Covered employee becomes entitled to Medicare.
3. Divorce or legal separation.

4. Loss of dependent child status under the terms of the plan.
5. Retiree or retiree's spouse or child loses coverage within one year before or after the commencement of proceedings under Chapter 11 of the U.S Bankruptcy Code.

**Length of Coverage**

The length of COBRA continuation coverage that must be offered depends on the type of Qualifying Event. When a Qualifying Event causes a loss of coverage, the employer must allow COBRA continuation coverage under the group health plan for up to 18 months for Qualifying Events that are the termination of employment or reduction of hours. This period may be extended to 29 months if the Qualified Beneficiary is or becomes disabled at any time during the first 60 days of continuation coverage. A second Qualifying Event for a dependent occurring during the 18-month continuation coverage period of the first Qualifying event extends the original period to 36 months.

**Non-Compliance**

The Department of Labor estimates that approximately 90 percent of all employers that are subject to Federal COBRA law are out of compliance. Non-compliance leaves the employer exposed to fines, excise taxes, and lawsuits.

**IRS**

The IRS may impose an excise tax of up to $100 per day, per individual ($200 per day per family). In general, the non-compliance period begins on the date the COBRA violation first occurs and ends on the earlier of:

A. The date the failure is corrected, or
B. The date that is 6 months after the last day the employer was required to provide continuation coverage.

The excise tax generally will not be imposed if it is determined by the Secretary of the Treasury that no potentially liable person would have known that a failure existed. This is referred to as the "Inadvertent Failure Rule". The excise tax may also not apply if the failure is corrected within 30 days. (sec. 4980b).

For violations which are not corrected before the date a notice of

examination is sent to the employer, and which occurred during the period under examination, the tax may be the lesser of $2,500 per affected beneficiary, or the excise tax that would apply based on the length of the violation.

Higher minimum tax may apply where violations are more than "de minimis" (more than trivial), and may be applied in the amount of $15,000, instead of $2,500.

**ERISA**

In addition to excise taxes imposed by the IRS, ERISA penalties may apply. The administrator may be personally liable to the participant or beneficiary for up to $110 per day, measured from the date of the failure, until the violation is corrected.

**Compliance Tips**

While the intent of Congress was to ensure that certain individuals have the opportunity to continue their health coverage at group rates, COBRA has placed a certain administrative burden on the employer. Managing COBRA continues to be a challenge to most employers. Documentation, training, and definable procedures are the keys to proper COBRA administration. As an employer, you should, at a minimum:

1. Appoint an individual within the company (possibly a Human Resources professional), to be your company's COBRA Plan Administrator.
2. Have a COBRA Procedures Manual. This is an outline of the methods by which your company manages the day-to-day responsibilities of COBRA.
3. Have a resource your Plan Administrator can access for questions or problems that may arise.

The purpose of the CobraAid COBRA Administration Manual is to assist the Plan Administrator in managing the complexities of COBRA. The manual contains forms, notices, instructions and a COBRA Procedures Manual. While the information contained within this manual is believed to be accurate, it is not intended to be a substitute for legal counsel.

## Plans that must comply

Any company that maintains, or sponsors, a group health plan, and employs 20 or more full or part time employees during 50 percent or more of the business days in the preceding calendar year are subject to COBRA. Governmental plans (within the meaning of Internal Revenue Code section 414(d)), and Church plans (within the meaning of IRC section 414(e)) are excepted from COBRA. All full-time and part-time common law employees, regardless of whether or not they are covered under the Plan, are taken into account when determining whether the company must comply with COBRA.

According to COBRA Regulations, part time employees may be counted as a fraction of a full time employee, with the fraction equal to the number of hours the part time employee works divided by the number of hours an employee must work in order to be considered full time, not to exceed 40 hours per week. Self-employed individuals, independent contractors, and directors are not considered common law employees, and these individuals are not taken into account for COBRA purposes.

According to IRC 414, all employees of the Plan Sponsor and all related employees under common control are to be counted when considering whether the employer must comply with COBRA. The Plan Administrator should be certain to determine if there is any relationship, either direct or indirect, with another corporation. Once a company determines that it must comply with COBRA, it must do so for the entire calendar year. In other words, if the employer determined that they had 20 or more employees for 50 percent of the business days during the last calendar year, they will then have to comply for current year, even if during the current year they fall below the 20-employee mark.

For example, The Bread Company employed 20 or more employees for all of 2014. Due to decreased demand for its products, the workforce was reduced to 10 employees for all of the year 2015. The Bread Company was still subject to COBRA for the entire year 2015. For the year 2016, they would no longer have to offer COBRA continuation coverage. However, it is important to note that even though an employer who is no longer subject to COBRA may not have to offer continuation coverage going forward, those Qualified Beneficiaries who elected continuation coverage while the employer was subject to COBRA must be allowed to continue coverage until the maximum coverage period expires.

## Notice Requirements

Internal Revenue Code Sec. 4980B requires the group health plan to provide, upon commencement of coverage under the plan, a written notice of COBRA rights to each covered employee and spouse (if any). The Code also requires a Qualifying Event Notice be provided when a Qualified Beneficiary experiences a Qualifying Event.

It is important to note that while ERISA requires a description of COBRA rights in the Summary Plan Description (SPD), and the Department of Labor requires that the SPD contain information that clearly identifies which circumstances may result in a forfeiture or suspension of any benefits under the plan, it is suggested that the employer send a separate Initial Notice of COBRA rights. The use of the SPD to provide the Initial Notice is not prohibited under COBRA law. However, the method of delivery of the SPD to the covered employee may be insufficient. If called upon, the plan must be able to produce proof that both the Initial Notice and Qualifying Event notices were “provided” in good faith, which according to the Department of Labor, means sending via First-Class mail to the last known address.

If, as a matter of course, the employer uses hand delivery, or sends the SPD regular mail addressed to the employee only (and not the spouse, if any), this may in fact be insufficient in that there may be no proof that the notice was actually provided. Remember, the plan does not have to prove that the notice was actually received, only that it was “provided”.

## Initial (General) Notice of COBRA rights.

The single most overlooked part of COBRA is the requirement that employers provide an Initial Notice of COBRA rights to newly covered employees, spouses, and/or dependents when they first become covered under the company’s group health plan. COBRA law specifically stipulates that *two* notices are to be provided.

IRC Section 4980 (B)(f)(6)(A) states “*the group health plan shall provide, at the time of commencement of coverage under the plan, written notice to each covered employee and spouse of the employee (if any) of the rights provided under this subsection*.” The 2004 Final Regulations require the plan administrator to provide a general notice of COBRA rights to each covered employee and spouse **within 90 days of the of the date coverage begins**. If a

qualifying event occurs during the 90-day period before the general notice has been provided, the general notice requirement is satisfied if the COBRA election notice in provided in a timely manner. Providing a general notice with the election notice is not required in this case.

**Notice Requirement** **Content**

The notice must contain the following information

I. Name of plan.
II. Information about who may become qualified beneficiaries.
III. Types of qualifying events that may entitle the individual to continuation coverage.
IV. Employer's obligation to inform the plan administrator of qualifying events.
V. The maximum COBRA continuation coverage period and explanation of events that may extend the coverage period. VI. Premium requirements.
VII. Any requirement the qualified beneficiary has to notify the plan administrator of certain qualifying events, such as divorce, legal separation, child's loss of dependent status under the terms of the plan, or a disability determination by the Social Security Administration.

Generally, the notice should explain the need for all qualified beneficiaries to keep the plan administrator informed of their current address. The notice should also state that the notice is general in nature and more information is available in the Summary Plan Description and from the plan administrator.

And while The Department of Labor has issued a Model Notice that may be used to satisfy COBRA’s Initial Notice requirement, it is recommended that legal counsel review all COBRA notices, forms, etc. The language contained within a company’s COBRA notices should include the necessary language that applies to their plan.

**Timing of Initial or General Notice**

The general notice of COBRA rights must be provided to the covered employee and spouse within 90 days of the commencement of coverage under the plan. Prior to the 2004 Final Regulations, plans were required to provide a general notice "at the time of commencement of coverage under the plan". This was ambiguous and subject to interpretation. The 90-day period clarifies the time requirement.

**Use of Summary Plan Description as General Notice**

Since the Summary Plan Description (SPD) is required to be provided to the covered individual within 90 days, and must contain a description of the COBRA rights and obligations of both the plan and qualified beneficiaries, it is acceptable to include the general notice in the SPD and still satisfy the COBRA general notice requirements. The issue arises as to the method of delivery. If the SPD is given to

the employee at work, this does not satisfy COBRA's notice requirements. A separate general notice must still be mailed to the employee and covered spouse.

Many employers focus much of their COBRA efforts on the so-called "back-end" of COBRA. That is, employers often satisfy COBRA requirements by providing a Qualifying Event Notice to Qualified Beneficiaries. However, the single biggest reason employers are out of compliance is the failure to provide the Initial Notice.

As an employer, you will know when certain Qualifying Events occur, such as termination or reduction of employees' hours. However, for other events, such as divorce or legal separation, or a child who no longer meets the plan's eligibility requirements, you may not know unless the employee notifies the Plan Administrator.

Obviously, the employee can only be expected to notify their employer of these events if they have been made aware of their obligations to do so. These obligations and responsibilities are outlined in the Initial Notice of COBRA rights. The Department of Labor has issued an advisory opinion stating *that a person who is not properly notified of their rights cannot be held liable for a failure to perform his or her obligations under COBRA.* For this reason, it is imperative that the Plan Administrator not only provide an Initial Notice to newly covered employees, but also follow a set procedure, and document how each notice was "provided".

**First Class Mail**

While COBRA does not specifically instruct the employer how to provide" the Initial Notice, it is strongly recommended that the Plan Administrator send these notices to the employee and spouse via 1st Class Mail to the last known address. Using an alternative, such as regular mail, or placing the notice in the employee's "new hire" packet, may prove to be insufficient for a number of reasons.

A single notice addressed to the covered employee and spouse is sufficient if the employer's records show that the employee and spouse both reside at the same address. The notice should be addressed to both the employee and spouse. If the employee and spouse do not reside at the same address, a separate notice must be sent. As with other COBRA notices, first class mail with proof of mailing is sufficient.

Remember, the covered employees' spouse also must be provided with the notice, and simply handing it to the employee, or including it with other employment related paperwork does not provide the proof necessary to show good faith compliance. The Department of Labor has issued a technical release stating that the use of 1st Class Mail as a means of providing COBRA notices does in fact show "good faith" on the part of the employer. Again, the Department of Labor does not prohibit the use of other methods, including oral notification of COBRA

rights, however, whether these other methods satisfies the good faith requirements will be considered on a case by case basis.

The Plan Administrator will not be required to provide proof that the notice was actually received by the employee only that it was "provided". Case law has shown that a Qualified Beneficiary will be treated as having received the Notice if the Plan Administrator provided the notice in "good faith".

It is imperative that all Qualified Beneficiaries be provided with the Initial Notice so that they may familiarize themselves with their rights and responsibilities under COBRA.

**Initial Notices must also be provided to:**

1. Employees who previously declined coverage, but have chosen to enroll at the last open enrollment.

2. A new spouse (of a covered employee) who becomes covered under the Plan.

**Planning Tip for Initial Notice**

While the requirement that employers provide an Initial Notice of COBRA rights to each newly covered individual is often the most overlooked facet of COBRA administration, it is the most easily correctable. When it comes to proving compliance, the burden of proof is on the employer to show "good faith". Numerous court cases have hinged not on whether the notice was sent, but whether the employer could show documentation that the notice was sent. If the Plan Administrator does not have documentation that all currently covered employees (and spouses and/or dependents, if applicable) have been provided an Initial Notice of COBRA Rights, then steps should be made to immediately address this.

## Qualified Beneficiary/Qualifying Events

A Qualified Beneficiary generally is an individual covered by a group health plan on the day before a Qualifying Event.

Qualifying Events are certain events that may cause an individual to lose health coverage.

**ALL OF THE FOLLOWING ARE CONSIDERED QUALIFYING EVENTS:**

1. Termination of the employee's employment for any reason other than gross misconduct.
2. Reduction of hours worked by employee, including

strike, and leave of absence.
3. Death of the employee.
4. Divorce or legal separation.
5. Dependent child ceasing to meet the plan's eligibility requirements.
6. Loss of coverage by the dependent because the covered employee becomes entitled to Medicare.

7. Loss of coverage by a retiree within one year before or after the commencement of proceedings under Chapter 11 of the U.S Bankruptcy Code.

A child born to, or placed for adoption with a covered employee during a period of COBRA continuation coverage is considered a Qualified Beneficiary. Also, in the case of a Qualifying Event that is the bankruptcy of the employer, a covered employee who had retired on or before the date of the loss of coverage is also considered a Qualified Beneficiary. Also, any spouse, surviving spouse, or dependent child covered on the day before the Qualifying Event is a qualified beneficiary under the plan.

A Qualifying Event can only occur when the plan is subject to COBRA. That is, a termination, reduction of hours, or other event that occurs during a plan year in which the employer is not subject to COBRA (i.e. qualified for the small employer exception) are not Qualifying Events and therefore continuation coverage does not need to be offered.

When determining whether or not a Qualifying Event has occurred, it should be understood that the Qualified Beneficiary does not have to suffer a complete loss of coverage. The Final Regulations make clear that to "lose coverage" means to cease to be covered under the same terms and conditions as in effect immediately before the Qualifying Event. A loss of coverage may include an increase in the employee contribution that results from a Qualifying Event.

Reductions or elimination of coverage in anticipation of an event are not considered in determining whether the event results in a loss of coverage. For example, if an employee removes a spouse from coverage in anticipation of a divorce, COBRA continuation coverage must be made available as of the date of the divorce (or legal separation), not before.

## Cal-Cobra and Federal COBRA (for CA employers only)

Governor Gray Davis signed into law assembly bill 1401 that extends California's continuation health insurance coverage period to 36 months for ALL Qualified Beneficiaries. The information contained in this manual and the Qualifying Event forms pertain only to the law's effects on Federal COBRA. For information on Cal-COBRA, please consult your insurance carrier.

California employees who begin receiving Federal COBRA continuation coverage on or after January 1, 2003, and, under Federal COBRA law, would have been eligible for less than 36 months of coverage, are now eligible for up to 36 months of coverage.

Employers should send only Termination or Qualifying Event notices that provide information to the Qualified Beneficiary of their rights to extend coverage under this new law.

FOR COBRA NOTICES, VISIT:
http://www.cobraaid.com/document-library

1.Notice to Terminating Employees in California: The Health Insurance Premium Payment Program (HIPP).

2.Notice for Persons Disabled by HIV/AIDS. The CARE/HIPP Program. These programs provide benefits to certain individuals with high cost medical conditions (HIV/AIDS).

3.Qualifying Event Notices that contain information about the availability of additional state continuation coverage.

For a complete text of Assembly Bill 1401, please e-mail your request to http://www.cobraaid.com/document-library.

**Options under Covered California:**

1.Continue coverage under COBRA. You might choose this option if you are undergoing medical treatment or if you don’t want to change anything about your plan or current network of doctors and hospitals, for example.

2. Special enrollment in a Covered California health insurance plan outside of the annual open-enrollment period. To take advantage of the special-enrollment opportunity, you have 60 days before and 60 days after your employer

-sponsored coverage ends to apply for and select a Covered California plan. It is important to note that if you miss this special-enrollment period, you have to wait fo
r the next annual open-enrollment period to enroll in a health plan unless you have a  qualifying life event for another special-enrollment period.

3. Seek coverage elsewhere, in the individual market outside of Covered California or through a spouse's employer-sponsored health plan,
for example.
For more, visit www.coveredca.com

## Length of Continuation Coverage

The maximum coverage period, that is, the length of time a Qualified Beneficiary may remain covered under COBRA, will depend on the type of Qualifying Event that the individual experiences. The length of time will range from 18 to 36 months, beginning on the date of the Qualifying Event.

IT IS IMPORTANT TO NOTE, HOWEVER, THAT COBRA CONTINUATION COVERAGE MAY TERMINATE PRIOR TO THE END OF THE MAXIMUM COVERAGE PERIOD FOR ANY OF THE FOLLOWING REASONS:

1. **Non-payment of premiums**. Continuation coverage for a Qualified Beneficiary may be terminated if the premiums are not paid in a "timely" manner. A payment is considered "timely" if it is made on the due date, or within the 30-day grace period (45 days for the initial premium payment).
2. **Termination of all Group Health Plans**. Continuation coverage for a Qualified Beneficiary may be terminated if the employer ceases to sponsor any group health plan.
3. **Other Coverage**. Continuation coverage may be terminated if the Qualified Beneficiary first becomes covered under another group health plan, which does not contain any pre-existing exclusion limitation, after the Qualified Beneficiary elects COBRA continuation coverage.
4. **Entitlement to Medicare.** Continuation coverage may also be terminated if the Qualified Beneficiary first becomes entitled to Medicare after the Qualified Beneficiary elects COBRA continuation coverage.
5. **Loss of Social Security Disability Status.** Continuation coverage may be terminated if the Qualified Beneficiary is determined to be no longer disabled by the Social Security Administration. Coverage can, however, be terminated only during the 11-month disability extension period.
6. **Termination for Cause.** Continuation coverage may be terminated, for cause, if the Plan would otherwise terminate coverage on that basis for similarly situated covered employees.

**18 Months for Qualifying Events That Are:**

1. Termination of employment for reasons other than gross misconduct.
2. Reduction in the number of hours of employment.

For these Qualifying Events, the maximum continuation coverage period will be **18 months**, measured from the date of the Qualifying Event. This maximum coverage period may be extended to **29 months** if a Qualified Beneficiary who is, under Title 11 or XVI of the Social Security Act, determined to have been disabled at the time of a Qualifying Event, or, within the first **60 days** of COBRA continuation coverage for all Qualified Beneficiaries. COBRA continuation coverage may be expanded to **36 months** for a spouse or dependent of an employee who has experienced one of the above listed Qualifying Events if a second Qualifying Event occurs, (such as divorce, legal separation, death of the employee, Medicare entitlement, or loss of dependent child status) during the original 18 month COBRA continuation coverage period. Notification by the Qualified Beneficiary should be made to the Plan Administrator within 60 days of the second Qualifying Event, and within the original 18 month COBRA continuation coverage period.

**36 Months for Qualifying Events That Are:**

1. Death of the covered employee.
2. Divorce or legal separation.
3. Dependent child ceases to meet the plan's eligibility requirements
4. When dependents would lose coverage due to covered employee becoming entitled to Medicare.

For these Qualifying Events, the maximum coverage period will be 36 months, measured from the date of the Qualifying Event, or, up to 36 months measured from the date of the covered employee's Medicare entitlement, if the covered employee becomes entitled to Medicare and, within 18 months thereafter, has a Qualifying Event that is either termination of employment, or reduction of hours.

On February 13, 2004, the Internal Revenue Service issued revenue Ruling 2004-22, which addresses the extension of COBRA coverage (to 36 months) for spouses and dependents who are covered under COBRA . Prior to this ruling, it was standard practice to offer family members an extension, to 36 months, when the ex-employee became entitled to Medicare. This extension was outlined in COBRA's "second qualifying event" rules.

### IRS Revenue Ruling—Medicare as a 2nd Qualifying Event

The facts as addressed in the Revenue Ruling are as follows:

Employee and spouse are covered under a group health plan subject to COBRA. Employee terminates employment and both employee and spouse lost coverage under the plan as a result of the termination. Both are offered COBRA for up to 18 months. Spouse elects COBRA and during the 18-month coverage period, the former employee becomes entitled to Medicare. The plan is notified of the Medicare entitlement within 60 days.

### The Legal Question

Is the Medicare entitlement of the covered employee a second qualifying event for the spouse if the Medicare entitlement would not have resulted in a loss of coverage for the qualified beneficiary under the group health plan that is providing the COBRA coverage?

### The Ruling

The IRS concluded that the employee's spouse would not be entitled to an extension of the maximum coverage period (from 18 to 36 months).

The IRS opined that the spouse would only be entitled to the extension if the 2nd qualifying event results in a loss of coverage for the qualified beneficiary under the plan within the maximum coverage period. To determine whether the event is a "second qualifying event" that would extend coverage to 36 months, the IRS uses the following test:

1. Apply the terms of the plan to the qualified beneficiary as if the covered employee had not experienced the termination of employment, and:

2. Determine whether the occurrence of the 36-month event would result in a loss of coverage under the plan within 36 months after the covered employee's termination of employment.

**Why Medicare Entitlement May Not Be A 2nd Qualifying Event**

Under the IRS' interpretation of the regulations, a qualifying event can only occur if there has been a resulting loss of coverage. Medicare entitlement cannot cause a loss of coverage, and so it is not a qualifying event. Medicare Secondary Payer provisions prohibit plans from treating current employees, their spouses, and dependents differently from other group plan participants solely because one of them has reached age 65, or is entitled to Medicare because one of them has reached age 65.

The IRS looked at the fact raised in Revenue Ruling 2004-22 as if the covered employee had not been terminated. In other words, the IRS ignores the initial qualifying event (termination of employment) that triggered COBRA in the first place. The fact that the employee became entitled to Medicare cannot result in a loss of coverage for any plan participant (due to Medicare Secondary Payer Rules). Therefore, the spouse is not entitled to an extension of the maximum coverage period to 36 months because the employee's entitlement to Medicare is not a qualifying event.

Employers should consult with legal counsel to determine the best course of action with respect to this ruling. Because the courts may reject the IRS' interpretation of this COBRA statute, the plan should consider whether or not to change their COBRA procedures. COBRA regulations do not prohibit offering 36 months of coverage, regardless of this ruling.

**29 Months for Qualifying Events That Are:**

A Qualified Beneficiary who is determined under Title II or XVI of the Social Security Act, to have been disabled at the time of a Qualifying Event, or, within the first 60 days of COBRA continuation coverage for all Qualified Beneficiaries, may be eligible to continue coverage for a total of **29 months** (11 additional months). The Qualified Beneficiary must provide, to the Plan Administrator, a determination of disability from the Social Security Administration within **60 days** of the date of the determination, and prior to the end of the original 18-month COBRA continuation coverage period. The employer is permitted to charge up to **150%** of the applicable premium during the 11 month disability extension. The Qualified Beneficiary is also required to notify the Plan Administrator, in writing, if the Social Security Administration has determined that the Qualified Beneficiary is no longer disabled under Title II or XVI of the Social Security Act.

**Bankruptcy of the Employer**

When a retiree, spouse or child of a retiree loses coverage within one year before or after the commencement of proceedings under Chapter 11 of the U.S. Bankruptcy Code The maximum period of COBRA continuation coverage is as follows:

1. Coverage will continue, until the date of death, for covered employees, who retired on or before the date of the loss of coverage. Lifetime coverage is also available to widows or widowers of retirees.
2. Continuation coverage will be made available for the spouse and dependent children of a retiree for 36 months from the date of death of the retiree.

**Leave of Absence/FMLA**

A leave of absence (i.e. reduction of hours) by a covered employee that results in a loss of coverage is treated as a Qualifying Event. COBRA continuation coverage must be made available as of the date coverage is otherwise lost. Some employers may offer alternative coverage to employees taking a leave of absence. In this case, if the alternative coverage differs from the coverage the employee had on the date prior to the Qualifying Event, they should be allowed the opportunity to choose either the alternative coverage, or COBRA continuation coverage. The Family and Medical Leave Act (FMLA) of 1993 was created to allow eligible employees the right to take 12 weeks of leave for certain family and medical reasons during a 12 month period. Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked at least 1,250 hours over the previous 12 months, and work at a location where the employer within 75 miles employs at least 50 employees. The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period.

FMLA requires employers to continue the same health benefits for employees during their period of unpaid leave and pay the same portion of the employee's premium that was being paid prior to the FMLA leave. IRS Notice 94-103 states that leave taken under FMLA is not considered a Qualifying Event for COBRA purposes because there has been no loss of coverage. A Qualifying Event may occur, however, if the employee fails to return to work at the end of the FMLA leave. In this case, the Qualifying Event is considered to have occurred on the last day of FMLA leave, which is when it becomes known that an employee is not returning to work and no longer is

entitled to FMLA leave.

**Other Coverage**

The employer may not deny to the Qualified Beneficiary the option of COBRA continuation coverage based on the fact that the Qualified Beneficiary has other health coverage prior to the date COBRA continuation coverage is elected.

**Gross Misconduct**

The employer, however, is not required to offer COBRA continuation coverage to individuals who have been terminated from employment because of “gross misconduct” (IRC section 4908B (f)(3)(B). Unfortunately, “gross misconduct” is not defined in COBRA law. In the absence of any clear guidance from the IRS or Department of Labor on what constitutes gross misconduct, the employer should consider denying continuation coverage only in cases where the employer has a clear, well-documented case of gross misconduct. There have been numerous court cases in which ex-employees have sued challenging their former employers' failure to offer continuation coverage. Because of the nature of the alleged behavior, what might be considered gross misconduct in one job or industry may not be considered as such in another, and as a result, there has been no clear standard to follow. It is recommended that before a Plan Administrator denies continuation coverage to a Qualified Beneficiary because of termination due to gross misconduct, they make certain that they are able to produce sufficient documentation to back the claim. Also, if the employee accused of gross misconduct is allowed to resign, this may be seen as intent on the employer part to waive the allegations, and therefore, continuation coverage must be offered.

**Qualifying Event Notices**

Final COBRA rules and ERISA section 606(a)(2) require the employer to provide notice to the plan administrator when the following qualifying events occur:

I. Termination of employment (for reasons other than gross misconduct).
II. Reduction in hours of employment.
III. Death of the covered employee.
IV. Covered employee becomes entitled to Medicare.
V. Employer files for bankruptcy under Chapter 11 of the U.S Code.

The purpose of the notice is to make the Qualified Beneficiary aware of the availability of continuation coverage, the maximum period for which coverage will be available, and the costs associated with such coverage.

The employer is required to notify the Plan Administrator of a Qualifying Event within 30 days of the Qualifying Event.

The Plan Administrator in turn has 14 days to provide a Qualifying Event Notice to the affected Qualified Beneficiary. In cases where the employer is also the Plan Administrator, the Department of Labor has confirmed in an Information Letter that the employer/plan administrator has 44 days to provide the Qualifying Event Notice to the Qualified Beneficiary.

In the case of divorce, legal separation, or a dependent child losing dependent status, it is the responsibility of the covered employee, spouse, or dependent child to notify the Plan Administrator within 60 days of the date of the Qualifying Event or the date that coverage would have otherwise been lost as a result of the event, whichever is later. This requirement further underscores the importance of the Initial Notice. The employer is responsible, through the Initial Notice, for making the covered individuals aware of their responsibilities should they experience a Qualifying Event.

**Notice Contents**

The **notice from the employer** must contain sufficient information to enable the plan administrator to notify the qualified beneficiary of their COBRA rights. The notice should contain:

I. The qualifying event date.
II. Type of qualifying event.
III. Name of the covered employee.
IV. Name of the plan.

The qualifying event notice/election **notice** must be provided **to the qualified beneficiary** and contain certain information that informs the individual of their rights under COBRA. This notice must contain information that is written in a manner that can be easily understood by the average plan participant. The notice should include the following:

1) The name of all qualified beneficiaries to which the qualifying event applies.
2) The date of the qualifying event.
3) Type of qualifying event (termination of employment, divorce, etc.)
4) The name of the plan.
5) Name, address and phone number of plan administrator.
6) Election rights expiration date.
7) Explanation of the rights to an independent election.
8) The consequence of not electing COBRA coverage.
9) Date COBRA coverage will begin, if elected.
10) Type of coverage available to the qualified beneficiary.

11) The maximum COBRA coverage continuation period and any events that may cause COBRA coverage to be terminated prior to the end of the maximum continuation coverage period.
12) How the maximum continuation period may be extended due to Social Security disability or another 2nd qualifying event.
13) Premium information, due dates, grace periods, address where payments may be made, and consequence of non-payment of premiums.
14) A statement informing the qualified beneficiary that the notice is general in nature and more information may be obtained from the plan administrator.
15) A statement explaining the importance of keeping the plan administrator informed of any changes, such as change of address, divorce, child no longer dependent, etc.

**Delivery of Notice**
A single notice addressed to the covered employee and spouse is sufficient if the employer's record show that the employee and spouse both reside at the same address. The notice should be addressed to both the employee and spouse.

If the employee and spouse do not reside at the same address, a separate notice must be sent. As with other COBRA notices, first class mail with proof of mailing is sufficient.

**Applicable Coverage**
A Qualified Beneficiary must be offered coverage which is identical to the coverage provided under the plan to similarly situated nonCOBRA beneficiaries. If coverage is modified for active employees, continuation coverage may also be modified. According to the 1999 Final Regulations, the requirement that the Qualified Beneficiary be allowed to choose core only coverage when both core coverage and non-core coverage are bundled together has been removed.

This effectively requires the Qualified Beneficiary to elect the same coverage they had on the day before the Qualifying Event. In cases where the employer offers both core and non-core coverage under separate, unbundled plans, the Qualified Beneficiary will be allowed to choose from among any or all of the coverage the Qualified Beneficiary had on the day before the Qualifying Event. This rule again underscores the intent of COBRA to treat Qualified Beneficiaries the same as similarly situated covered employees.

### Qualifying Event Notice by Employee

The covered employee or qualified beneficiary must notify the plan administrator of the following events. The plan's procedures will be considered reasonable if :

**I.** The procedures are described in the plan's SPD.
**II.** Describe the means by which the notice may be given, and the individual this notice may be given to.
**III.** Describe the information required of the qualified beneficiary.
**IV.** If the plan requires use of a specific form, this form must be made available to the qualified beneficiary upon request.

The qualified beneficiary must notify the plan in case of the following.

**I.** Divorce or legal separation.
**II.** Child's loss of dependent status under the terms of the plan.
**III.** Determination of disability by the Social Security Administration, or termination of disabled status by the Social Security Administration.
**IV.** Any 2nd qualifying event that extends the maximum coverage period from 18 to 36 months, or, in the case of disability extension, from 29 to 36 months.

Employers must provide a reasonable written procedure for covered individuals and qualified beneficiaries to provide notice of certain qualifying events. The notice from the covered individual or qualified beneficiary should be considered sufficient if it contains the following:

**I.** Name of the plan
**II.** Name of qualified beneficiaries.
**III.** The type of qualifying event.
**IV.** The date of the qualifying event.

### Timing of Notice

The covered employee or qualified beneficiary must notify the plan administrator:

**I.** Within 60 days of the date of the divorce or legal separation.
**II.** Within 60 days of the date the child loses dependent status according to the terms of the plan.
**III.** Within 60 days of the date of the determination, by the Social Security Administration, of the qualified beneficiary's disabled status.
**IV**. Within 30 days of the termination of disability status, as determined by the Social Security Administration.

### Insurability Requirements/Adverse Selection

While it is true that Qualified Beneficiaries who elect to receive COBRA continuation coverage tend to be more likely to have health issues, and as a result, file more claims, the employer may not require any evidence of insurability on the part of the Qualified Beneficiary in order to be eligible for continuation coverage.

### Conversion Plans

Many group health plans contain a provision that allows the covered individual to purchase an individual health insurance policy, without being required to show evidence of insurability, when the individual ceases to be covered under the group health plan. If a Qualified Beneficiary's COBRA continuation coverage ends as a result of the expiration of the maximum coverage period, the group health plan must, during the 180 day period that ends on that expiration date, provide the Qualified Beneficiary the option of enrolling under a conversion health plan if this option is available to similarly situated nonCOBRA beneficiaries under the group health plan.

### Region Specific Plans

The 1999 Final Regulations eliminate the requirement that plans, such as HMO's, are required to have employees in the area to which the Qualified Beneficiary is moving. If the employer sponsors a group health plan for similarly situated nonCOBRA beneficiaries that could be extended to the area in which the COBRA Qualified Beneficiary is moving, then the employer is required to make that coverage available to the Qualified Beneficiary.

If the employer does not sponsor any group health plans in the area to which the Qualified Beneficiary is moving (because the plans are all region specific), then the employer is not required to make coverage available to the relocating Qualified Beneficiary.

### Geissal v. Moore Medical Corp. (Other Coverage)

Perhaps the single biggest COBRA related court case. The Supreme Court rejected the idea that an individual who has other group health coverage or becomes entitled to Medicare prior to electing COBRA continuation coverage does not have to be offered continuation coverage. Plan Administrators should make certain that a Qualified Beneficiary who has other group health coverage or becomes entitled to Medicare prior to the date of the COBRA election be offered continuation coverage. The 1999 Final Regulations eliminate the rule in the 1987 proposed regulations that an individual is not a qualified beneficiary, if on the day before the qualifying event, the individual was entitled to Medicare benefits.

## Notice of Unavailability of Coverage

### Notice Requirement

According to the 2004 Final Regulations, if a plan administrator receives notice of any first or second qualifying event from an individual or qualified beneficiary, and the plan administrator determines that the individual is not entitled to COBRA, or an extension of COBRA, the plan administrator must provide the individual with an explanation of why the individual is not entitled to elect COBRA. The notice should be written so that it can be understood by the average plan participant.

### Timing of Notice

ERISA's claims and appeals procedures require that a written response to any denial of COBRA coverage be provided within **14 days** after the plan administrator receives the notice of qualifying event from an individual.

### Delivery of Notice

A single notice addressed to the covered employee and spouse is sufficient if the employer's records show that the employee and spouse both reside at the same address. The notice should be addressed to both the employee and spouse. If the employee and spouse do not reside at the same address, a separate notice must be sent. As with other COBRA notices, first class mail with proof of mailing is sufficient.

## Notice of Early Termination of COBRA Coverage

### Notice Requirement

The 2004 Final Regulations require that the plan administrator notify each qualified beneficiary of any termination of COBRA coverage that will occur prior to the end of the maximum coverage period.

### Timing of Notice

This notice must be provided "as soon as practicable following the plan administrator's determination that continuation coverage shall terminate". The notice must state:

I. The reason that continuation coverage has terminated prior to the end of the maximum continuation period.

II. The date coverage will terminate.

III. Any rights the qualified beneficiary has under the plan or other applicable law to elect alternative group or individual coverage, such as conversion rights.

**Delivery of Notice**

A single notice addressed to the covered employee and spouse is sufficient if the employer's records show that the employee and spouse both reside at the same address. The notice should be addressed to both the employee and spouse. If the employee and spouse do not reside at the same address, a separate notice must be sent. As with other COBRA notices, first class mail with proof of mailing is sufficient.

## 2018 Notice Requirements-Chart

| Type | Who Sends | Description | When to send | Model Notice Available? | Alternate Delivery? |
|---|---|---|---|---|---|
| General or Initial Notice | Plan Administrator or to covered employee and spouse. | Minimum Requirements | Within 90 days of beginning of coverage. | Yes | SPD |
| Qualifying Event Notice-Employer | Employer to plan administrator | Info about plan, qualifying events, and dates of events. | 30 days after qualifying event. | Yes | None |
| Election Notice | Plan Administrator to Qualified Beneficiary. | Minimum requirements as listed in Final Regulations. | 14 days after notice of QE, or 44 days if employer is plan administrator. | Yes | None |
| | Additional Notices | | | | |
| Notice of Cobra Unavailability | Plan Administrator to individuals who provided QE notice | Why individual is not entitled to COBRA. | Same as election notice timeframe. | NO | None |
| Early Termination Notice. | Plan administrator to qualified beneficiaries. | Reason for, date of termination, conversion rights, if any. | "As soon as practicable" after decision is made to terminate. | NO | None |

## Electing COBRA

### Election Period

The Qualified Beneficiary has 60 days from the later of a) the date coverage would be lost as a result of the Qualifying Event, or b) the date the notice was provided to the Qualified Beneficiary. There have been, however, a number of court cases in which the date the Qualifying Event Notice was actually *received* marked the beginning of the 60-day election period. Before rejecting an election form that may be received a few days after the 60-day election period ends, the Plan Administrator should determine whether the Qualified Beneficiary actually made the election within 60 days of the receipt of the Qualifying Event Notice. The maximum COBRA continuation period is generally measured from the date of the Qualifying Event , not the date of election. As a result, a Qualified Beneficiary who waits until the last day of the election period before choosing to elect will have his/her coverage reinstated retroactively back to the original benefits termination date.

### Initial Premium Payment

Along with the 60-day election period, the Qualified Beneficiary then has 45 days from the date of the election to make the initial premium payment. This effectively means that the Qualified Beneficiary may have as much as 105 days (60-day election period plus 45 days to make the initial payment) in order to decide whether or not they actually want COBRA continuation coverage.

Also, it is important that the Plan Administrator understand that according to COBRA law, the premium payment is considered made on the date sent (the postmark date). Upon receipt of the Initial Premium Payment, the Plan Administrator should verify that the payment is the proper amount. A record should be made reflecting the date the payment was made, and the insurance carrier should be contacted to reinstate coverage.

### Non-election/Waiver of Coverage

If a Qualified Beneficiary fails to elect continuation coverage within 60 days and make the Initial Premium Payment within 45 days, they forfeit all rights to COBRA continuation coverage. However, a Qualified Beneficiary may waive coverage during the election period (i.e. make a verbal or written statement to the Plan Administrator), and then later revoke this waiver, as long as they are still within the election period. If the Qualified Beneficiary waives coverage and then revokes this waiver (within the 60 days election period), this will be

considered a timely election.

## Cobra Premiums

For COBRA purposes, the applicable premium is defined as the cost to the plan for the period of coverage for similarly situated nonCOBRA beneficiaries.

The Qualified Beneficiary may be charged up to 102 percent of the applicable premium for COBRA continuation coverage. 150 percent of the applicable premium may be charged during the 11-month Social Security Disability extension, but only if the disabled Qualified Beneficiary is included in the COBRA coverage. Also, the Plan may not charge, for any period of continuation coverage, 150 percent of the applicable premium if the disabled Qualified Beneficiary experiences a second Qualifying Event during the original 18-month continuation period.

However, if the disabled Qualified Beneficiary experiences a second Qualifying Event during the 11 month disability extension, the plan may charge 150 percent of the applicable premium for the duration of the continuation coverage period. The 1999 Final Regulations make clear that 150 percent of the applicable premium may not be charged for any period for which the Qualified Beneficiary would have been entitled to receive coverage without regard to the disability extension.

When determining under what rate plan (i.e. individual, individual plus spouse, family, etc.) the Qualified Beneficiary will be billed, the Plan Administrator must take into account the number of Qualified Beneficiaries electing coverage. Generally, the rate plan used should be the same rate plan that would be used for those individuals for whom a qualifying event has not occurred. For example, if the spouse and child, employee, spouse and child, or employee and children elected continuation coverage, the family rate (plus 2 percent) would normally apply.

However, even though a “child only” category may not be specifically be an option under the plan, it is important to remember that each Qualified Beneficiary has an independent right to elect coverage. In this case, if the only Qualified Beneficiary to elect coverage was the child, the rate charged should be the

individual rate (plus 2 percent). The IRS has reasoned that if only the child elects continuation coverage, they are more similarly situated to an individual than a family, and thus the individual rate may apply.

### Applicable Premium

### Determination Period

The determination of any applicable premium must be made for a period of 12 months and must be determined prior to the beginning of the period. Generally, the determination period will be the plan year. However, the determination period may be any 12-month period (plan year, rating year, etc.) as long as the determination period is applied consistently from year to year.

### Applicable Premium for Self-Insured Plans

COBRA law provides for a special rule for self-insured plans. First, the plan may determine the applicable premium on an actuarial basis, and take into account such factors as the Secretary of Treasury may prescribe in regulations. If this method is used, the plan should obtain an objective opinion from a qualified professional. Using the second method, the plan may determine the applicable premium on the basis of past cost. This method may not be used in cases where there has been a significant change in coverage between the determination periods, or a significant change in the number of employees covered by the group health plan between the determination periods.

### Billing of Qualified Beneficiaries for COBRA coverage

COBRA law does not specifically require the billing or providing of payment vouchers or grace letters to COBRA Qualified Beneficiaries who elect continuation coverage. However, to assist the Qualified Beneficiary in maintaining continuation coverage, the Plan Administrator may choose to send an invoice to the Qualified Beneficiary each month.

If this method is used, the invoice should make clear the date payment is due, the last day on which the payment may be made, the total amount due, and the address to which the premium payment should be sent. COBA law considers a payment to have been made on the date sent (i.e. the postmark date). Documentation of all payments, including copies of the envelope containing the postmark date, should be retained by the Plan Administrator.

**Short Premium Payments/NSF Checks**

The Final Regulations clarify that premium payments for continuation coverage that are short by an amount that is “insignificant” should not result in a loss of coverage. A payment shortfall is considered insignificant if it is not greater than $50 or 10% of the required amount, whichever is less. The Plan Administrator may either accept the payment as a payment in full, or notify the Qualified Beneficiary and allow an acceptable period of time (30 days) to make the full payment.

In cases where a check for continuation coverage is returned by the bank for Non-sufficient Funds (NSF), the Plan Administrator should take steps to notify the Qualified Beneficiary. If time allows, a letter should be sent to the Qualified Beneficiary requesting a replacement payment. If the NSF payment is received too close to the end of the grace period, the Plan Administrator should call the Qualified Beneficiary to make them aware that a replacement payment must be made prior to the expiration of the grace period.

**Third Party Payment**

The Final Regulations also clarify the issue of payments for continuation coverage on behalf of Qualified Beneficiaries by a third party. The Plan Administrator must accept (and be prepared to accept) a payment from someone other than the Qualified Beneficiary. In some instances, an ex-spouse as part of a divorce decree may make payments.

Or, in some states where a Medicaid program may apply, the State may be the payer. In any case, the Final Regulations do not require that the third party be a legal representative of the Qualified Beneficiary. As such, timely, accurate payments should be accepted regardless of the source.

**Election without a premium payment**

A Qualified Beneficiary has 45 days from the date of the election in order to make the initial premium payment. The Plan Administrator may not make the election of coverage contingent on the Qualified Beneficiary making the first premium payment at the time of election. If the Qualified Beneficiary fails to make the initial premium payment within the 45-day grace period, all COBRA continuation coverage will be terminated.

For a group health plan that provides health services such as an HMO or a walk-in clinic, a Qualified Beneficiary who has not yet elected or paid for coverage may be required to either elect and pay for continuation coverage, or pay a reasonable charge for services (but

only if the Qualified Beneficiary will be reimbursed within 30 days of election and payment of continuation coverage).

Also, the plan may treat the Qualified Beneficiary's use of the

plan's health services as a constructive election of COBRA continuation coverage, and if it notifies the Qualified Beneficiary prior to the use of services, can require payment for COBRA continuation coverage.

For indemnity or reimbursement type health plans, the employer may continue the Qualified Beneficiary's coverage during the election period, or, cancel coverage until the Qualified Beneficiary elects coverage and then retroactively reinstate the coverage. Either way, the plan must make continuation coverage available during the entire election period if the Qualified Beneficiary makes a timely COBRA election. Any claims incurred by the Qualified Beneficiary during this election period do not have to be paid until a timely election and payment of initial premium is made.

**Future Payments/Non-Payment**

COBRA law mandates that the plan must accept monthly payments from Qualified Beneficiaries. Other options may be made available, such as weekly or quarterly, but the plan may not require the Qualified Beneficiary to pay on any other basis except monthly. Except for the initial premium payment (which the Qualified Beneficiary has 45 days to make), any subsequent monthly payments that are not made within the 30 day grace period will result in a cancellation of continuation coverage with no possibility of reinstatement. Coverage will be cancelled retroactively to the first day of the coverage period for which payment was not made.

**Provider Inquiries**

The 1999 Final Regulations adopted the position from the U.S Court of Appeals in the case *Communication Workers of America v. NYNEX Corp,* that a group health plan must make a complete response to any inquiry from a health care provider regarding the a Qualified Beneficiary's right to COBRA continuation coverage during the election period. The plan must disclose the fact that although a Qualified Beneficiary has not yet elected COBRA continuation coverage and may not be on the plan, the Qualified Beneficiary may elect continuation coverage during the election period and will then have coverage reinstated retroactively.

Also, the plan must inform the provider if the Qualified Beneficiary has remained on the plan but has not yet made a timely election and thus is subject to a retroactive cancellation if timely election is not made.

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## Flexible Spending Accounts

According to Internal Revenue Code Section 5000(b)(1), a health Flexible Spending Account does satisfy the definition of group health plan, and thus are generally subject to COBRA continuation coverage requirements. The 2001 Regulations contain a rule that may exempt the plan from offering COBRA continuation coverage if it meets three conditions:

1. The health FSA is not subject to the HIPAA portability provisions because the benefits provided under the health FSA are excepted benefits. For this to occur, the employer must provide other HIPAA covered benefits and the FSA benefit maximum does not exceed the greater of two times the employee's salary reduction, or, the employee's salary reduction plus 500 dollars.
2. The maximum that the health FSA could require to be paid equals or exceeds the maximum FSA benefit available for the year.
3. If, as of the date of the Qualifying Event, the maximum benefit available under the FSA is not more than the maximum amount that the plan could require as payment.

If the health FSA satisfies the first two conditions, the health FSA is not required to make COBRA continuation coverage available. If the third condition is met with respect to a specific Qualified Beneficiary, the health FSA does not need to make COBRA continuation coverage available to that Qualified Beneficiary.

## HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) amended ERISA to provide rights and protections for participant's in group health plans. Generally, HIPAA provides protection for individuals by limiting exclusions for pre-existing conditions, prohibiting discrimination against employees based on health status, and allowing special enrollment rights in certain circumstances.

HIPAA impacts COBRA in that the plan must provide a Certificate of Creditable Coverage to the individual when a) the individual ceases to be covered under the group health plan, and b) when the individual ceases COBRA continuation coverage.

Any individual who elects to be covered under the group health plan, and b) when the individual ceases COBRA continuation coverage. Any individual who elects COBRA will then receive two Certificates of Creditable Coverage. One Certificate will be issued when the individual ceases to be covered under the plan, and another when COBRA continuation coverage ends.

A certificate must also be issued to any formerly covered individual upon request so long as that request is made within 24 months of the date coverage was lost. The individual may then present this certificate to their new group health carrier. The purpose is to reduce or eliminate the pre-existing condition exclusion period. If there has been no break in coverage of 63 days or more, the individual will receive a “credit” that will reduce the pre-existing condition period by one day for every day of coverage. This method is known as the “standard method”. HIPAA also permits an “alternative method” for crediting coverage.

Under the alternative method, the plan or issuer separately determines the amount of an individual’s creditable coverage for any of the five following categories of benefit: mental health, substance abuse treatment, prescription drugs, dental care and vision care. The plan must notify the individual if it is using the alternative method for any benefit plans.

While many insurance carriers are issuing HIPAA certificates, there are instances when the COBRA plan administrator may be required to provide the certificate. For example, not all carriers automatically issue a HIPAA certificate when the individual ceases COBRA continuation coverage. Also, since a waiting period cannot be used when determining the 63-day break in coverage, the insurance carrier may fail to issue a certificate to an individual who terminated employment prior to reaching the end of the waiting period. The carrier would not have issued a certificate because the individual was not covered under the plan; however, the ex-employee is entitled to a certificate if one is requested.

HIPAA Also Guarantees Insurability for Individuals Who:

1. Have had coverage for at least 18 months where the most recent period of coverage was under a group health plan.
2. Have not had their group health coverage terminated because of fraud or non-payment of premiums.

3. Have exhausted their COBRA continuation coverage.

4. Are not eligible for coverage under another group health plan, Medicare, or Medicaid or have any other group health coverage.

A group health plan is required to allow special enrollment for certain individuals to enroll in the plan without having to wait until the plan's next open enrollment. This "special enrollment" applies if an individual with other health insurance loses that coverage.
A special enrollment also occurs if a person has, or becomes, a new dependent through marriage, birth, adoption or placement for adoption. The individual must notify the plan to request special enrollment within 30 days after losing coverage, or within 30 days of becoming, or having become, a new dependent.

Special enrollees may not be treated as late enrollees for purposes of any pre-existing condition exclusion period. Therefore, the maximum pre-existing condition exclusion period that may be applied is 12 months, reduced by the individual's creditable coverage (rather than the 18 months reduced by creditable coverage)

**Affordable Care Act and COBRA**

The Affordable Care Act requires employer to notify employees and qualified beneficiaries via the COBRA Qualifying Event Notice that in addition to being entitled to elect COBRA, other coverage may be available through the marketplace.

The law requires the following statement to be included in the COBRA notice:

There may be other coverage options for you and your family. When key parts of the health care law take effect, you'll be able to buy coverage through the Health Insurance Marketplace. In the Marketplace, you could be eligible for a new kind of tax credit that lowers your monthly premiums right away, and you can see what your premium, deductibles, and out-of-pocket costs will be before you make a decision to enroll. Being eligible for COBRA does not limit your eligibility for coverage for a tax credit through the Marketplace. Additionally, you may qualify for a special enrollment opportunity for another group health plan for which you are eligible (such as a spouse's plan), even if the plan generally does not accept late enrollees, if you request enrollment within 30 days.

Additionally, dependents now "age out" of their parent's group health plan at age 26 and are entitled to 36 months of COBRA continuation coverage.

Employer should not use COBRA notices that predate the ACA. For the latest COBRA Notices, please visit :
http://www.cobraaid.com